Affirmed 66 Rehd.

Submitted Jan. 26 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~191.~~ 211

JOHN W. STOUT AND JACOB O. STOUT, APPELLANTS,

vs.

FRANCIS J. LYE, PHILIP WALSH. THE FIRST NATIONAL BANK OF DELPHOS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 30, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 491.

JOHN W. STOUT AND JACOB O. STOUT, APPELLANTS,

vs.

FRANCIS J. LYE, PHILIP WALSH, THE FIRST NATIONAL BANK OF DELPHOS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Bond for costs	1	1
Bill in chancery	2	1
Writ of subpœna	9	5
Appearance of First National Bank of Delphos	11	6
Answer and disclaimer	11	6
Answer of First National Bank of Delphos	12	7
Amended answer of First National Bank of Delphos	15	9
Supplemetal bill	20	11
Notice of motion	24	13
Counter affidavit	25	14
Hearing and cause taken under advisement	26	14
Replication	27	15
Decree	27	15
Certificate of evidence	28	16
COMPLAINANTS' PROOF.		
Testimony of Francis J. Lye	29	16
DEFENDANTS' PROOF.		
Testimony of Joseph Boehmer	34	19
Agreed statement of facts	37	21
Appeal bond	42	24
Clerk's certificate	44	25

1 Pleas in the circuit court of the United States for the northern district of Ohio, held at the United States court-rooms in the city of Cleveland, in the district aforesaid, before the judges thereof, on Thursday, the twenty-first day of March, in the January term of said court, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and second year.

EARL BILL, *Clerk.*

JOHN W. STOUT ET AL
v.
FRANCIS J. LYE ET AL. } In chancery.

NORTHERN DISTRICT OF OHIO, *ss:*

Be it remembered that on the twenty-third day of February, A. D. 1876, came said complainants, by Hutchins and Campbell, their solicitors, and filed in the office of the clerk of the circuit court of the United States for said northern district of Ohio, at Cleveland, in the district aforesaid, their bond for costs, and also at the same time filed their bill of complaint in said entitled cause, which said bond and bill are respectively in the words and figures following, to wit:

Bond for costs.

In the circuit court of the United States for the northern district of Ohio. In chancery.

JOHN W. STOUT AND OTHERS
vs.
FRANCIS J. LYE AND OTHERS.

We, Hutchins and Campbell, do hereby acknowledge ourselves security for all costs for which the complainants may be liable in the above entitled suit.

HUTCHINS AND CAMPBELL.

(Endorsed:)
Taken and filed February 23d, 1876.

EARL BILL, *Clerk.*

2 *Bill of complaint.*

In the circuit court of the United States for the northern district of Ohio.

JOHN W. STOUT AND JACOB O. STOUT, partners, doing business under the name and style of John W. Stout and Brother, plaintiffs,
vs.
FRANCIS J. LYE AND PHILLIP WALSH, partners, doing business under name and style of Lye and Walsh; First National Bank of Delphos, at Delphos, Allen County, Ohio; Charles Emerson and Peter Phelan, trustees; and the Savings Bank of Delphos, at Delphos, Ohio, defendants. } Petition.

To the judges of the circuit court of the United States for the district of Northern Ohio:

The said plaintiffs, John W. Stout and Jacob O. Stout, partners, doing

business in the name and style of J. W. Stout and Brother, of the city of New York, in the State of New York, and citizens of the said State of New York, bringing this their petition or bill against Francis J. Lye and Phillip Walsh, partners, doing business under the name and style of Lye and Walsh; First National Bank of Delphos, at Delphos, in Allen County, Ohio; Charles Emerson and Peter Phelan, trustees, of Allen County, Ohio, and the Savings Bank of Delphos, all of said defendants being residents of Allen County, Ohio, and citizens of the said State of Ohio; and thereupon your petitioners and orators complain and say:

3 1st. That at the January term, 1876, of the said circuit court of the United States for the northern district of Ohio, to wit, on the 31st day of January, A. D. 1876, your orators, by the consideration of said court in a suit therein pending, recovered a judgment against the said Francis J. Lye and Phillip Walsh, partners as aforesaid, for the sum of five thousand one hundred and thirty dollars and twenty cents damages, and thirty-seven dollars and six cents costs of suit, which judgment is now in full force and unpaid.

2d. That your orators, on the 1st day of February, 1876, caused an execution to be duly issued on said judgment, directed to the marshal of said court, and the said marshal, for the want of property real or personal of the said Philip Walsh and Francis J. Lye, as partners, and for the want of goods and chattels of either the said Lye or Walsh, the said marshal/ duly levied said execution on the following real estate, the property of the said Francis J. Lye, to wit, situated in Allen County, Ohio, being in lots number one hundred and sixty-eight (168) and one hundred and sixty-nine (169) of the village of Delphos, Allen County, Ohio, upon which is situated the brick dwelling-house of Francis J. Lye; also outlot number forty-one (41) of the village of Delphos, Allen County, Ohio, containing (3½) three and a-half acres of land, more or less; which property was duly appraised at the sum of ten thousand dollars.

3d. That the said Francis J. Lye, on the 6th day of November, 1873, executed a mortgage to the said First National of Delphos, on the above described real estate, purporting to secure his promissory note of $6,000, which he, as stated in said mortgage, on the 1st day of

4 November, 1873, had executed and delivered to the said First National Bank of Delphos, Ohio. Said mortgage contains a description of said real estate, and has the usual condition therein written, and is recorded in the recorder's office of said Allen County, vol. No. 9 of mortgage records, and was received for record by the recorder of Allen Co. Nov. 10th, 1873.

4th. That the said Francis J. Lye, on the 25th day of September, 1874, executed and delivered to the said Charles Emerson and Peter Phelan, trustees (as stated in the mortgage), a second mortgage on the said lots 168 and 169, with the appurtenances thereto, situated in Delphos, Allen County, Ohio. This 2d mortgage purports to secure notes described in the condition of the mortgage, as follows: "That if the said Francis J. Lye, heirs, executors, administrators or assigns, shall pay or cause to be paid to the order of the Savings Bank of Delphos, Ohio, heirs, executors, administrators, successors or assigns, his promissory notes, dated October 1st, 1874, being series of ten notes each of five hundred dollars, number one to ten inclusive, payable five years after date, to the order of the said Charles Emerson and Peter Phelan, trustees, with interest from date at 8 per cent. per annum, represented by ten interest notes attached to each promissory note, and payable to the 4th National Bank of New York semi-annually, from maturity until

paid." Said last named mortgage, among others, has the usual condition, and provides also "that if the said Lye should, at any time, neglect or become in default in complying with his covenants on payment
5 of interest due, then and in that case all the said notes become due, and this mortgage absolute." The last named mortgage purports to have been executed on the 25th day of September, 1874, and was received for record Sept. 29th, 1874, and recorded in vol. 12 of mortgages, in the recorder's office of Allen County, Ohio, pages 115, 116, and 117. For a more particular description of the terms and condition of the two mortgages above described, your orators refer to certified copies of the same herewith filed as Exhibits A and B.

5th. That the said First National Bank of Delphos also holds, as collateral security for any indebtedness which may be lawfully due it from the said Francis J. Lye, a promissory note, secured by mortgage on real estate of the Union Flower Mill of Delphos, of which the following is a copy:

"$12,000.] DELPHOS, OHIO, *January 15th*, 1876.

"One hundred and seventy days after date, we promise to pay to the order of F. J. Lye the sum of twelve thousand dollars, for value received, with eight per cent. interest after maturity.

"THE UNION FLOWER MILL OF DELPHOS,
"By J. F. LYE, *President*.

The said note purports to be secured by a mortgage deed duly executed by the Union Flower Mill of Delphos to the said F. J. Lye, and by him with the mortgage assigned to the said First National Bank of Delphos, who now claims to hold the same. Your orators believe that said last named note is well secured on the following described real estate: "In lots number nine (9) and ten (10) in the village of Delphos, Allen County,
6 Ohio." The last named mortgage was received for record January 17th, 1876, and recorded in vol. 12 of mortgages in said Allen County, pages 447 and 448, in said recorder's office.

6th. Your orators believe and charge that the said mortgage 1st described and executed by the said J. F. Lye to the First National Bank of Delphos was and is illegal, for the want of authority in said bank to take and receive it, and is therefore void as against the lien of your orators, by virtue of their judgment, lien, and levy above stated; that said mortgage was in fact given to secure a loan made at the date of the execution and delivery of said mortgage; and that the note was dated back to make it appear that it was for a pre-existent debt.

Your orators further believe and charge that, if it shall appear that said mortgage is a legal one and a valid lien on the land therein described for any purpose, that a large amount of said note of six thousand dollars is for illegal and usurious interest, and to that extent is not a valid obligation or a lien on the land therein described. And your orators also charge that, for whatever amount there may be lawfully due from the said Lye to said First National Bank of Delphos, evidenced by said note and secured by said mortgage, the bank is amply secured by the note of $1,200, and mortgage given to secure it, as described above, and that in equity said First National Bank of Delphos cannot, as against your orators, hold both of said notes and mortgages to their prejudice.

7th. Your orators further believe and charge that the mortgage
7 2dly described in this bill to the said Charles Emerson and *and* Peter Phelan, trustees, was in fact for the Savings Bank of Delphos,

to secure a loan made at or after the date and execution of the mortgage, and that the said mortgage was and is illegal for the want of authority of said last named bank or said trustees for its use to take and receive it, and the same is void as against the lien of your said orators on said land duly made as aforesaid by virtue of said judgment and levy. And your orators further charge that *that* if it shall appear that the said mortgage is a valid one to said Charles Emerson and Peter Phelan, trustee, for any purpose or amount, that a large proportion of said ten series of notes of $500 is for illegal and usurious interest, and to the extent of the amount of said illegal interest said notes are not valid obligations or a lien on the land described in the mortgage.

8th. Your orators, in conclusion, say that they cannot by reason of the facts above set forth collect their said judgment and costs by a sale of the lands described in said mortgages, as the same is inadequate to pay what purports to be due said banks on the face of said mortgages, and your orators' said judgment and costs, and they can only obtain full and adequate relief in a court of equity; and they therefore pray that the said Francis J. Lye, Phillip Walsh, The First National Bank of Delphos, Charles Emerson, and Peter Phelan, trustees, and the Savings Bank of Delphos, be made parties to this bill; that they, and each of them, be duly notified to appear and answer all the allegations in this bill relating to each, and that if said allegations be found to be true, as to the illegality of the two mortgages, executed and delivered to the said
8 First National Bank of Delphos, and the said Charles Emerson and Peter Phelan, trustees for the Savings Bank of Delphos, respectively, that the court will so declare and decree, and remove the same by a decree of this honorable court from being a lien on the lands therein described, and that said lands may be ordered sold, free from said pretended liens, to pay the amount due on said judgment and costs and the costs of this suit. But if said mortgages, or either of them, shall be found to be valid for any purpose, that then the court will find the amount legally due on the notes intended to be secured by said mortgages, and that said lands therein described may be sold and the moneys arising therefrom be applied according to the amount and priorities of liens. And that if said First National Bank of Delphos holds the note of $12,000 against the Delphos Union Flourer Mill as collateral security to the amount lawfully due by the note of $6,000 claimed to be secured by the mortgage first described in this bill, that it then be decreed to collect the amount legally due, if anything, from the last-named note and mortgage, and that its lien, if any, be decreed to be released on the lands covered by the mortgage first described, and that the court will grant such other and further relief in the premises as justice and equity may require to protect the rights of your orators.

JOHN W. STOUT AND
JACOB O. STOUT,
By HUTCHINS AND CAMPBELL,
Their Attorneys.

9 John Hutchins, one of the attorneys for said plaintiffs, being duly sworn, says that said plaintiffs are non-residents of said district and absent therefrom, and that Hutchins and Campbell are the attorneys for said plaintiffs, and he believes the statements in said bill contained are true.

JOHN HUTCHINS.

Sworn to by said John Hutchins before me and subscribed by him in my presence this 23d day of February, 1876.

EARL BILL,
U. S. Comm'r.

(Endorsed:)
Filed Feb'y 23d, 1876.

EARL BILL, *Clerk.*

And on the same day, to wit, the 23d day of February, A. D. 1876, a writ of subpœna, together with a memorandum, issued out of said clerk's office against said defendants; which said writ and memorandum, together with the return of the marshal endorsed thereon, are in the words and figures following, to wit:

Writ of subpœna.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the marshal of the northern district of Ohio, greeting:

You are hereby commanded to summon Francis J. Lye, Phillip Walsh, The First National Bank of Delphos, Charles Emerson, and Peter Phelan, trustees, and the Savings Bank of Delphos, if they may be found in your district, to be and appear in the circuit court of the United States for the northern district of Ohio aforesaid, at Cleveland, on the first Monday in April next, to answer a certain bill in chancery, filed and exhibited in said court, against them, by John W. Stout and Jacob O. Stout, partners, doing business under the name and style of John W. Stout and Brother. Hereof they are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 23d day of February, A. D. 1876, and in the 100th year of the Independence of the United States of America.

[SEAL.] EARL BILL, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1876; otherwise the said bill may be taken pro confesso.

EARL BILL, *Clerk.*

NORTHERN DISTRICT OF OHIO, *ss:*

On the 25th day of February, 1876, I made due service of this writ at Delphos, Allen County, Ohio, by leaving a true and duly certified copy thereof at the usual place of abode of the within named Francis J. Lye, in the hands of his daughter Lauretta, the said F. J. Lye being absent from home, and by delivering a true and duly certified copy thereof to Philip Walsh and to Peter Phelan, trustee; and on the same day I delivered a true and duly certified copy thereof to I. M. C. Marble, president of the within-named First National Bank of Delphos, and by delivering a true and duly certified copy thereof to I. M. C. Marble, president of the Savings Bank of Delphos, at Van Wert, Van Wert County, Ohio. The

within-named Charles Emerson not found; neither has he a residence in this district.

W. B. PRENTICE,
U. S. Marshal,
By JOHN PHARIS, *Deputy*

(Endorsed:)
Returned and filed Feb'y 29, 1876.

CHAS. H. BILL, *Dep. Clerk.*

11 Afterwards, to wit, on the 28th day of March, A. D. 1876, the defendant The First National Bank of Delphos, by its solicitor, filed in said clerk's office its appearance in this cause, which is in the words and figures following, to wit:

Appearance First National Bank of Delphos.

U. S. circuit court N. D. O.

JOHN W. STOUT ET AL.
v.
FRANCIS J. LYE ET AL.

The First National Bank of Delphos, Ohio, now comes, by its counsel, John E. Richie, and enters its appearance as one of the defendants in the foregoing cause.

J. E. RICHIE,
Counsel for 1st Nat. B'k of Delphos, O.

(Endorsed:)
Filed March 28, '76.

CHAS. H. BILL, *Dep. Clerk.*

Afterwards, to wit, on the 28th day of March, A. D. 1876, said defendant Savings Bank of Delphos, by its counsel, filed in said clerk's office its answer and disclaimer in said entitled cause; which said answer and disclaimer is in the words and figures following, to wit:

Answer and disclaimer of Savings Bank of Delphos.

U. S. circuit court northern district of Ohio.

JOHN W. STOUT ET AL.
against
FRANCIS J. LYE ET AL.

The said Savings Bank of Delphos, Ohio, defendants impleaded in the bill of the pl'ffs, and served with process herein, now come, and for answer to said bill of the plaintiff says that the mortgage executed to it by the defendant Francis J. Lye was so executed for the purpose of enabling said savings bank to effect a loan to the said Francis J. Lye through said bank in the money markets of the city of New York, or the city of Boston, and for no other purpose; that said bank failed
12 to procure such loan, whereby the consideration of said mortgage wholly failed, and said mortgage is without consideration, and the same is not a lien in favor of said bank or any other person or corporation or association whatever. Said savings bank therefore dis-

claims any interest in the real estate of said Francis J. Lye by reason of the execution of said mortgage or the notes purporting to be secured thereby. It therefore asks that it may go hence with its costs.

THE SAVINGS BANK OF DELPHOS, OHIO,
By BALLARD AND RICHIE, *its Att'ys.*

(Endorsed:)
Filed M'ch 28, '76.

CHAS. H. BILL,
Dep. Clerk.

Afterwards, to wit. on the first day of May, A. D. 1876, said defendant, First National Bank of Delphos, by its solicitors, filed in said clerk's office its answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of First National Bank of Delphos.

In the circuit court of the United States for the northern district of Ohio.

JOHN W. STOUT AND JACOB O. STOUT, PARTNERS, &c., plaintiffs,
v.
FRANCIS J. LYE ET AL., DEF'TS.

Answer of First National Bank of Delphos, Ohio.

For answer to the plaintiffs' petition or bill in equity, said First National Bank of Delphos, Allen County, Ohio, says:

That on the first day of Nov., 1873, the defendant Francis J. Lye was indebted to it in the sum of $6,000.00, for which sum he then executed to said bank his certain promissory-note of that date and thereby promised to pay said First National Bank said sum of $6,000.00 in four
13 months from said date, with 8 per cent. interest thereon from date; that on the 8th day of November, A. D. 1873, the said Francis J. Lye, by his initial letters, "F. J. Lye," executed to said bank his certain mortgage deed of that date, and thereby, for the purpose of securing to said bank the payment of said note of $6,000.00, conveyed to the said bank the premises in the petition of the plaintiffs herein described, and being in-lots numbers 168 and 169 of the village of Delphos, Allen County, Ohio, upon which is situated the brick dwelling-house of the said Francis J. Lye; also out-lot number forty-one of the village of Delphos, Allen County, Ohio, containing (3½) three and one-half acres, more or less, as in said mortgage described, which said mortgage was duly left with the recorder of Allen County, Ohio, for record, and by him recorded on the 11th day of Nov., 1873, in volume 9, records of mortgages of said county, at page 520; that said mortgage became at said last-named date a lien upon said premises.

Defendant further says, that on the 15th day of January, A. D. 1876, the said First National Bank filed its petition in the court of common pleas of Allen County, Ohio, against said F. J. Lye, asking a judgment upon said note, and for a foreclosure of said mortgage, and an order for the sale of said premises therein and heretofore herein described. That the said F. J. Lye was duly notified of the filing and prayer of said petition on the 20th day of January, A. D. 1876. That such proceedings

were had therein that afterward, to wit, on the 7th day of March, A. D. 1876, at the February term of the court of common pleas of Allen County, Ohio, and by the consideration of said court the said First National Bank of Delphos, Ohio, recovered a judgment against said Francis J. Lye in said action for the sum of seven thousand one hundred and twenty-eight dollars, the amount then found due and unpaid
14 on said note, with interest at 8% from said date until paid, which said sum the court found to be a lien upon the premises in said mortgage, and hereinbefore described, from the date of the filing of said mortgage for record, and said court then ordered that said premises should be sold to pay said sum, interest, and costs, upon the failure of the said Francis J. Lye to pay said sum, interest and costs, by a day certain, which has long since elapsed.

The said First National Bank of Delphos, Ohio, further answering, says that the $12,000.00 mortgage, referred to in said pl'ffs' petition, was given to secure an indebtedness of said Union Flouring Mills of Delphos, Ohio, to parties other than said First National Bank; that said First National Bank was not at the time of the execution of said mortgage by said mills, nor has it hitherto, or is it now, the owner of said note, so by said mortgage secured, or of any interest therein, or of any interest in said mortgage, nor has it ever had or held said note or said mortgage securing the same, as a collateral or otherwise.

Said First Nat. Bank, further answering, says that it denies each and every allegation in said petition referring to it which is inconsistent with 'his answer. That each and every one of said averments is untrue. Wherefore said First National Bank of Delphos, Ohio, prays that it may be dismissed with its costs; and if the court is of opinion that it is a necessary party to said proceeding, then that the judgment and lien in its favor, as found by said court of common pleas of Allen County, Ohio, upon the foreclosure of said mortgage as against said F. J. Lye,
15 may be declare' the first lien upon said premises, and that any order made in this case in favor of said plaintiffs may be made subject to the lien and claim of said First Nat. Bank upon said premises, and for such other and further relief as equity may demand.

THE FIRST NAT. BANK OF DELPHOS, O.,
By J. E. RICHIE, *its Att'y.*

UNITED STATES OF AMERICA,
Northern District of Ohio, ss :

Before me personally came Joseph Boemer, who, being first duly sworn says that he is the cashier of the First National Bank of Delphos, Ohio, and that the facts stated in the foregoing answer are within his personal knowledge, and that the statements in said answer are true, as he believes.

JOSEPH BOEHMER.

Sworn to before me, and subscribed in my presence, this 19th day of April, 1876, A. D.

JAS. IRVINE,
Register Bankruptcy, Northern Dist. Ohio.

(Endorsed:) Filed May 1st, '76.

CHAS. H. BILL,
Dep'ty Clerk.

Afterwards, to wit, on the 13th day of November, A. D. 1876, said defendant, First National Bank of Delphos, by its solicitor, filed in said

clerk's office its amended answer in said entitled cause, which said answer is in the words and figures following, to wit:

Amended answer.

In the circuit court of the United States, northern district of Ohio.

JOHN W. STOUT ET AL., PL'FFS,
against
F. J. LYE ET AL., DEF'TS.

Amended answer.

And now comes the First National Bank of Delphos, Allen County, Ohio, and for its amended answer to the bill of said plaintiffs,
16 filed against it as one of the defendants herein, says:

FIRST DEFENSE.—That said plaintiff' ought not to maintain their said action against it in this court, for the reason that the circuit court of the United States, within and for the northern district of Ohio, has no jurisdiction of the subject-mat'er of this suit as against this defendant, and says, that on the first day of November, A. D. 1873, F. J. Lye, one of the defendants to this action, executed and delivered to said First National Bank of Delphos, Ohio, his certain promissory note of said date, as a renewal evidence of a debt he then, and for a long time prior thereto, owed to said bank, in the sum of $6,000.00, due in six months thereafter, with eight per cent. interest from date.

That on the 8th day of November, A. D. 1873, said F. J. Lye executed and delivered to said First National Bank of Delphos, Ohio, for the purpose of securing the payment of original debt so evidenced by said $6,000.00 note his certain mortgage deed upon the premises in the petition and bill of the said plaintiffs herein described, which said deed was in all respects executed in conformity to the laws of Ohio for the conveyancing and encumbering of real estate. Said mortgage deed was duly entered for record in the office of the recorder of Allen County, Ohio, being the county in which said real estate is situate, on the 10th day of November, A. D. 1873, at 11 o'clock a. m., and was duly recorded on the same day, in volume nine, at page 520, records of mortgages of Allen County, Ohio, and became a lien on said premises from the date of the filing thereof.

17 That said F. J. Lye failed to pay said note at the time it became due, and from thenceforth and hitherto has refused to pay the same.

That on the 15th day of January, A. D. 1876, the said First National Bank of Delphos, Ohio, filed its petition in the office of the clerk of the court of common pleas of Allen County, Ohio, against the said F. J. Lye, praying that it might have a judgment against him for said sum of $6,000.00 and interest thereon from Nov. 1st, 1873, at 8 % per annum, and that said mortgage might be foreclosed and said premises ordered to be sold to satisfy said debt, interest, and costs. That said bank caused a summons to issue on the same day, as required by law, against F. J. Lye, notifying him of the filing and pendency of said petition and the prayer thereof, which said summons was by the clerk of said court duly issued to the sheriff of Allen County, Ohio, and by him served on the said F. J. Lye on the 20th day of January, A. D. 1876, as required by law.

That afterward, to wit, on the 7th day of March, A. D. 1876, at the February term of the court of common pleas of Allen County, Ohio, by the consideration of said court, said First National Bank of Delphos, Ohio, recovered a judgment against said F. J. Lye in said action for the sum of $7,128.00, together with interest thereon at 8 % until paid, and costs of suit, taxed to $; and an order and decree foreclosing said mortgage and ordering that said premises should be sold and the proceeds applied to the satisfaction of said judgment, interest, and costs, upon the failure of the said F. J. Lye to pay the same by a day named in said order and decree. That said judgment is yet unsatisfied and no part thereof has been paid, although the time fixed in said
18 order and decree for the payment thereof has long since expired. That said order and decree is yet subsisting in full force and unreversed.

SECOND DEFENSE.—For a second and further defense to said bill of said plaintiffs, filed against it, the First National Bank of Delphos, Ohio, says:

That for a long time prior to the first day of November, A. D. 1873, the said F. J. Lye, one of the defendants to this action, was indebted to said bank in the sum of $10,000.00, for which sum said bank had no security, but held the unsecured note of the said F. J. Lye therefor.

That on the first day of Nov., A. D. 1873, for the purpose of getting said sum secured to it, said bank divided the same into two parts, one of $4,000.00, for which sum said Lye then executed his note and secured the same by collaterals then deposited with said bank, and the residue thereof of $6,000.00 the said F. J. Lye executed his note of renewal, due in six months from the date thereof, with eight per cent. interest until paid. That he, the said F. J. Lye, for the purpose of securing the payment of said $6,000.00 so evidenced by said note, on the 8th day of November, A. D. 1873, executed and delivered unto the said bank his certain deed of mortgage and thereby conveyed to said bank the premises in plaintiffs' bill described, which mortgage-deed was duly on the 10th day of Nov., A. D. 1873, left with the recorder of Allen County, Ohio, being the county in which said real estate is situate, for record, which mortgage-deed was afterwards by said recorder duly recorded on the 11th day of Nov., 1873, in volume 9, page 520, records of mortgages of
19 Allen County, Ohio. That said mortgage-deed was by the said F. J. Lye executed and delivered to the said First National Bank of Delphos, Ohio, and by said bank received for the sole purpose and object of securing to said bank said $6,000.00 of said $10,000.00 which said F. J. Lye had been indebted to it long prior to said first day of Nov., 1873. That no loan of money or other value was given to the said F. J. Lye by said bank at the time of executing said note for $6,000.00 or said mortgage-deed to secure the same; the whole and entire consideration of said note and of the mortgage was said debt existing prior to the execution of said note and mortgage.

Said First National Bank of Delphos, Ohio, says that it denies all and singular the allegations of said plaintiffs' bill as to it which are inconsistent with this answer. Wherefore said First Nat. Bank of Delphos, Ohio, prays that the bill of the said plaintiff may be dismissed, and that it may go hence with its costs, and in case that is not done, that its rights and lien may be protected, and for other proper relief.

FIRST NAT. BANK OF DELPHOS, O.,
By J. E. RICHIE,
Its Counsel.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, State of Ohio, County of Allen, ss:

Joseph Boehmer, being first duly sworn, says he is the cashier of the First National Bank of Delphos, Ohio, and that the statements in the foregoing answer are true, as he believes.

JOSEPH BOEHMER.

Sworn to by said Joseph Boehmer before me and subscribed in my presence this 8th day of Nov., A. D. 1876.

[SEAL.]

B. J. BROTHERTON,
Notary Public, Allen Co., Ohio.

(Endorsed:) Filed Nov. 13th, '76.

CHAS. H. BILL,
Dep. Clerk.

Afterwards, to wit, on the 20th day of November, A. D. 1876,
20 said plaintiffs, by their solicitors, filed in said clerk's office a supplemental bill of complaint in said entitled cause, which said bill is in the words and figures following, to wit:

Supplemental bill.

In the circuit court of the United States for the northern district of Ohio

JOHN W. STOUT AND JACOB O. STOUT
v.
FRANCIS J. LYE, PHILLIP WALSH, ET AL. } Supplemental bill.

To the judges of the circuit court of the United States for the northern district of Ohio:

John W. Stout and Jacob O. Stout, partners doing business in the name and style of J. W. Stout and Brother, of the city of New York, in the State of New York, and citizens of the said State of New York, bring this their supplemental bill against Francis J. Lye and Phillip Walsh and the First National Bank of Delphos, Ohio, citizens of Ohio, and resident in the county of Allen, in said State of Ohio.

And thereupon your orators complain and say that on the 29th day of December, A. D. 1875, being a day in the October term, 1875, of said circuit court, they commenced in said court an action against said Francis J. Lye and Phillip Walsh, defendants herein, for the recovery of the sum of $5,106.36 and interest.

Afterwards, on the 31st day of January, A. D. 1876, being a day in the January term, 1876, of said circuit court, your orators recovered in said action in said circuit court a judgment against said Francis J. Lye
21 and Phillip Walsh in the sum of two thousand five hundred and thirty dollars and twenty cents, their damages, and thirty-seven dollars and six cents, their costs.

On the same day your orators sued out of said court a writ of execution called a fierri facias, which was duly delivered to the marshal of said district, who on the first day of February, A. D. 1876, levied the same on the premises of said Francis J. Lye, described in the original bill filed herein, which judgment became a lien on said premises on and after the 4th day of January, A. D. 1876, that being the first day of said January term of said circuit court.

Afterwards, on the 23d day of February, A. D. 1876, your orators filed

their original bill herein, and set forth the fact that they had recovered said judgment against said Lye and Walsh and made said levy; that defendant, First National Bank of Delphos, claimed to have a mortgage on said premises of said F. J. Lye to secure the payment of a note of said Lye to said bank for $6,000, dated November 1st, A. D. 1873, and your orators alleged that said mortgage to said bank was illegal and void, and they prayed that the same might be so declared by the court and set aside and the lien of your orators protected and they might have other relief; said First National Bank of Delphos was made a party to said proceedings by your orators, and duly notified of the pendency of said proceedings on the 25th day of February, A. D. 1876.

On the 15th day of January, A. D. 1876, said First National Bank of Delphos, learning of the proceedings of your orators in said circuit court to recover said judgment against said Lye and Walsh as aforesaid, commenced a suit in the court of common pleas of Allen County, Ohio, to recover a judgment on said note for $6,000 against said F. J. Lye and to foreclose said mortgage of said Lye to said bank. Your ora-
22 tors were not made parties to said proceedings in said court of common pleas of Allen County, Ohio.

Afterwards, on the 7th day of March, A. D. 1876, being a day in the February term, A. D. 1876, of said court of common pleas of Allen County, Ohio, after the judgment and levy aforesaid of your orators and the perfection of your orators' lien as aforesaid, after the filing of the original bill herein and the due notice of the same on said First National Bank of Delphos, which was made a party to said proceedings in said original bill, notwithstanding the fact that your orators were not made parties to said foreclosure proceedings, said First National Bank of Delphos procured in said court of common pleas of Allen County, Ohio, a judgment against said F. J. Lye for the sum of $7,128 damages, with interest thereon at the rate of eight per cent. per annum until paid and costs of suit, taxed at $, and a decree ordering said premises to be sold after a day certain to satisfy said judgment and decree. There was no proceeding in said cause in said court of common pleas of Allen County, Ohio, adverse to said First National Bank of Delphos, and said F. J. Lye made no defense to said proceedings.

Your orators say that now said First National Bank of Delphos has caused an order of sale to be issued on said judgment and decree, and is now seeking to sell said premises and satisfy said judgment and claim, and thereby overreach your orators and place it beyond their power to avail themselves of any order or decree this court may make herein; that said First National Bank of Delphos is wholly ignor-
23 ing the said proceedings in this court whereby your orators are seeking to enforce their rights in the premises, and said First National Bank of Delphos is seeking to have said premises sold and their said claim satisfied before this court can pass upon the issues made in this cause by and between your orators and said First National Bank of Delphos; that said First National Bank of Delphos has already caused an order of sale to be issued and said premises advertised to be sold at public auction on the 2d day of December, A. D. 1876. Your orators further say that said premises have been appraised at ten thousand dollars, and it would be a great damage to your orators to have said premises sold pending these proceedings, before the rights of your orators therein have been determined. Wherefore your orators pray that said First National Bank of Delphos may be enjoined and restrained from selling or causing to be sold said premises pending these proceedings and the determination of the rights of your orators therein, and that

they may have such other and further relief as in equity they may be entitled to.

HUTCHINS AND CAMPBELL,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

O. J. Campbell, being first duly sworn, deposes and says that he is one of the solicitors of the complainants, duly authorized in the premises; that the statements and allegations contained in the foregoing supplemental bill are within affiant's personal knowledge, and that the same are true in substance and in fact.

O. J. CAMPBELL.

24 Sworn to by said O. J. Campbell, before me, and by him subscribed in my presence, this 21st day of November, A. D. 1876.

[SEAL.] CHAS. H. BILL,
Notary Public.

(Endorsed:) Filed Nov. 21st, '76.

CHAS. H. BILL,
Dept. Clerk.

Afterwards, to wit, on the 24th day of November, A. D. 1876, said plaintiffs, by their solicitors, filed in said clerk's office a notice of motion in said entitled cause, which said notice is in the words and figures following, to wit:

Notice of motion.

In the circuit court of the United States for the northern district of Ohio.

JOHN W. STOUT AND JACOB O. STOUT
v.
FRANCIS J. LYE ET AL.

To the First National Bank of Delphos, Ohio:

You are hereby notified that on Tuesday, the 28th day of November, A. D. 1876, at ten o'clock in the morning, or as soon thereafter as counsel can be heard, application will be made to Hon. Martin Welker, one of the judges of said court, in the U. S. court-room at Cleveland, for the allowance of an injunction to restrain you from selling or causing to be sold the premises of said Francis J. Lye, on which you now claim to hold a mortgage to secure a note for $6,000, which mortgage you are seeking to foreclose in the court of common pleas of Allen Co., Ohio, until after the rights of complainants therein have been determined by said circuit court and the further order thereof.

HUTCHINS AND CAMPBELL,
Solicitors for Complainants.

STATE OF OHIO,
County of Allen, ss:

25 Before me, the undersigned, personally appeared B. J. Brotherton, who, being duly sworn, deposes and says that on the 22d day of November, A. D. 1876, he served the within notice on J. M. C. Marble, president of said First National Bank of Delphos, Ohio, by delivering to him in person a true copy thereof.

B. J. BROTHERTON.

Sworn to and subscribed in my presence this 22d day of Nov., 1876.
[SEAL.] C. C. MARSHALL,
Notary Public.

(Endorsed:) Filed Nov. 24th, '76.
CHAS. H. BILL,
Dep. Clerk.

Afterwards, to wit, on the 28th day of November, A. D. 1876, said defendant, First National Bank of Delphos, by its solicitor, filed in said clerk's office a counter affidavit in said entitled cause, which said affidavit is in the words and figures following, to wit:

Counter affidavit.

U. S. circuit court, northern district of Ohio.

JOHN W. STOUT ET AL. } Application for injunction.
v.
FRANCIS J. LYE ET AL. }

Before me, a notary public in and for Allen County, and within the northern district of Ohio, personally came Joseph Boehmer, who, being by me first duly cautioned and solemnly sworn, deposes and says: That he was on the 10th day of December, A. D. 1875, hitherto had been, and still is, the cashier of the First National Bank of Delphos, in the county of Allen and State of Ohio, said bank being a defendant in the above-entitled cause; that he had charge of all the business of said bank. That he employed counsel and caused an action to be commenced in the court of common pleas of Allen County, Ohio, for said bank, wherein it was plaintiff and Francis J. Lye was defendant, to recover judgment against said Lye upon a note of $6,000, secured by mortgage on real estate, which suit was commenced January 15th, 1876, in said court.

That at no time prior to said 15th day of January, or upon said
26 15th day of January, A. D. 1876, did affiant know or have any knowledge or information that said plaintiffs were about to or had commenced an action, suit or proceeding in the circuit court of the United States for the northern district of Ohio against said defendants Lye and Walsh, or either of them, for the recovery of a judgment against them or either of them, or for any other purpose, and that not until the United States marshal levied on property of said F. J. Lye had he any knowledge in any way that said proceeding had been begun or any suit commenced by said John W. Stout et al. against Francis J. Lye et al. That the averment that said bank learned of said action prior to commencing said suit against F. J. Lye as contained in plff's' amended bill is untrue.

JOSEPH BOEHMER.

Subscribed and sworn to before me this 27th day of November, A. D 1876.
[SEAL.] B. J. BROTHERTON,
Notary Public, Allen Co., Ohio.

(Endorsed:) Filed Nov. 28th, '76.
CHAS. H. BILL,
Dep. Clerk.

Afterwards, to wit, on the 28th day of November, A. D. 1876, in the

October term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Martin Welker, district judge, is the following entry, to wit:

(Journal 8, page 260.)

This cause came on to be heard upon the complainants' motion for an injunction herein against said defendants, and was argued by counsel and taken under advisement by the court.

Afterwards, to wit, on the 5th day of December, A. D. 1876, said complainants, by their solicitors, filed in said clerk's office their replication in said entitled cause, which said replication is in the words and figures following, to wit:

27 *Replication.*

In the circuit court of the United States for the northern district of Ohio.
In chancery.

JOHN W. STOUT ET AL. }
v. } Replication.
FRANCIS J. LYE ET AL. }

And now come said complainants, and for replication to the amended answer of said defendant, First National Bank of Delphos, say that they will aver and prove their bill to be certain and sufficient, and that the answer of defendant First National Bank of Delphos is uncertain, untrue, and insufficient, and they deny each and every allegation of new matter set forth by said First National Bank of Delphos in said answer as a defense to said bill, and pray as in said bill they have already prayed.

HUTCHINS AND CAMPBELL,
Solicitors for Complainants.

(Endorsed:) Filed Dec. 5th, '76.

CHAS. H. BILL,
Dep. Clerk.

Afterwards, to wit, on the 21st day of March, A. D. 1878, in the January term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Martin Welker, district judge, is the following entry, to wit:

(Journal 9, page 277.)

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the complainants' bill herein filed be dismissed at the costs of said complainants, which costs, taxed $79.64, the said complainants shall pay within five days, or, in default thereof, that execution issue to collect the same as in judgments at law; whereupon come said complainants by their solicitors and give notice of their intention to appeal this cause to the next Supreme Court of the United States,
28 and this court allows such appeal and fixes the amount of the bond to be given by said complainants at $500.00.

Afterwards, to wit, on the 21st day of March, A. D. 1878, the following certificate of evidence in said entitled cause was filed in said clerk's office, and is in the words and figures following, to wit:

Certificate of evidence.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In the circuit court of the United States for the northern district of Ohio.
In equity.

JOHN W. STOUT ET AL.
vs.
F. J. LYE ET AL.

Be it remembered that on the 21st day of March, 1878, the day of the hearing of said cause, the following is a correct statement of the evidence exhibits, and agreed statement of facts submitted to the court by the respective parties thereto.

On behalf of complainant was offered the deposition of Francis J. Lye, which deposition is now on file in said cause, which was all the evidence introduced by said complainants, and which is in the words and figures following, to wit:

In the United States circuit court for the northern district of Ohio. In chancery.

JOHN W. STOUT ET AL.
vs.
F. J. LYE ET AL.

Deposition of witnesses taken in an action pending in the circuit court of the United States for the northern district of Ohio, wherein John W. Stout et al. are plaintiffs, and F. J. Lye et al. are defendants, and for said plaintiffs, at the time and place hereinafter certified, John Hutchins offering on behalf of plaintiffs, and John E. Richie offering for the defendants the First National Bank of Delphos, Ohio.

Testimony of F. J. Lye.

29 F. J. LYE, of the county of Allen, State of Ohio, of lawful age being first duly sworn by me as hereinafter certified, deposes as follows:

Ques. by John Hutchins for pl'ff. State whether or not you gave the 1st National Bank of Delphos a note for $6,000 on the 1st day of November, 1873, for a loan of money, and, if so, how was that loan and note secured?

Ans. I do not know as to the date, but they have a note and mortgage. The note was $6,000.00. There was quite an amount that was covered, and there was a part of the amount we owed them. I mean by we the firm of Lye and Walsh.

Ques. by do. At the time this note and mortgage was given, was the indebtedness of the firm of Lye and Walsh given up and cancelled, and after the giving of this note, and mortgage did the bank hold the notes of Lye and Walsh?

Ans. This was only a part of the indebtedness to them. The notes were given up to the extent of the $6,000.00 note.

Ques. by do. How were the notes which the bank held against the firm of Lye and Walsh, and which were taken up, secured?

Ans. They were secured in the first place by regular bank notes by personal security.

Ques. by do. At the time this $6,000 note and mortgage was given how much was the firm of Lye and Walsh indebted to the 1st National Bank at Delphos, and how long had this indebtedness been running?

Ans. At one time, I think, we were indebted to the bank to the amount of $19,000. At this time I think it must have been about $16,000.

Ques. by do. Had this indebtedness been kept alive by renewals each sixty or ninety days, that is, by giving new notes, and securities, and surrendering the old notes at the various times of renewal?

30 Ans. I guess it had been kept alive by renewals.

Ques. State whether or not when this $6,000 individual note was taken by the bank, Nov. 1st, 1873, it was the understanding that it should be secured by a mortgage on your house and out lot in Delphos, and whether or not it (the mortgage) was executed in pursuance of that understanding.

Ans. Yes, sir; it was understood that the note was to be secured by a mortgage, and the mortgage was executed accordingly.

Ques. What rate of interest did the bank charge, and was the interest paid, or was it put in the notes when they were renewed?

Ans. We usually paid the interest every ninety days. I suppose this was a part of the original debt. We paid interest on the note of ten and twelve per cent., I think mostly the latter.

Ques. You may state whether the indebtedness of Lye and Walsh to the First National Bank was for money loaned.

Ans. It was for money loaned.

Ques. State whether or not, at the time you gave this $6,000 note and mortgage, there was any money paid you by the bank.

Ans. There may have been, but I do not now remember.

Cross-examination by J. E. Richie, att'y for First Nat. Bank of Delphos, O.:

Ques. You say that you was indebted to the First Nat. Bank of Delphos, Ohio, on Nov. 1st, 1873, in about $16,000.00, and that the same was represented by regular bank-notes. Now are you positive as to there being personal surety on all this sum?

Ans. A portion of the indebtedness may have been by overdrafts.

31 Ques. Was not Wrecklege and Statcamp surety for you and Walsh on a note for five thousand dollars?

Ans. Yes, sir. I think at that time it was Wrocklege and Co., and C. C. Marshall.

Ques. Was there not an indebtedness to the bank at that time for which the bank held your individual note, without any surety, for the sum of about $10,000.00?

Ans. I don't know that I can remember. It is very likely there was. There was a note held in that way.

Ques. Was not the $6,000.00 note, which was secured by mortgage, given for a portion of the indebtedness, for which the bank held your individual unsecured note, and did not you give another note for the residue of the amount for which the bank held your individual note and pledge the mill stock to secure that note?

Ans. I have no doubt the two notes were made for a $10,000 claim.

I think the claim was against Lye and Walsh and not against F. J. Lye.

Ques. Can you say that it was not an individual note given for a firm debt?

Ans. These renewals were. I do not say that it was or that it was not.

Ques. Do you mean to say that the note held by the bank before the first of Nov., 1873, may or may not have been your individual note?

Ans. I cannot tell. If it was my individual note it was for a firm debt.

Ques. Why was not the indebtedness of Lye and Walsh to the bank paid Nov. 1st, 1873?

Ans. I think it was for the want of money.

Ques. For what was the $6,000.00 note and mortgage given to the bank in Nov., 1873.

Ans. For part of what we owed them prior to that time.

Ques. Was there not renewals before the making of the $6,000.00
32 note of the paper secured by Wrocklege and others only, and had not this $10,000.00 run for nine or twelve months without renewal?

Ans. That might have been so.

Ques. Was not the mortgage given to secure $6,000.00 of a debt due the bank long before the mortgage was executed?

(Ques. objected to by att'y for pl'ff.)

Ans. I don't recollect as to dates, but the mortgage was given for an original debt that had been standing for several years.

Ques. When did the indebtedness accrue for which the mortgage was given as surety?

Ans. We became indebted to the bank the years A. D. 1867 and A. D. 1870; it continued up to the time the mortgage was given and the mortgage was given for a part of the debt.

Re-examination:

Was not the indebtedness kept alive by renewals and payment of interest up to the time the $6,000 note was given, and at the time this $6,000 note and mortgage was given was not the old indebtedness canceled and given up to the extent of this $6,000 note?

(Ques. objected to by att'y for def't.)

Ans. The claim was kept alive by the payment of interest. I suppose the old indebtedness was cancelled to the extent of the note and mortgage or to the extent of $6,000.00.

Ques. Please state whether or not the indebtedness to the bank by Lye and Walsh was kept alive by renewals and payments of the interest.

(Ques. objected to by att'y for def't.)

33 Ans. I suppose they were.

Ques. Please state also whether or not the old notes at the giving of the $6,000 and mortgage were not cancelled and given up on the execution of the new note and mortgage.

(Ques. objected to by att'y for defendant.)

Ans. I suppose they were.

F. J. LYE.

I, Burrett J. Brotherton, a notary public for the County of Allen, State of Ohio, do hereby certify that the above named F. J. Lye was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the foregoing deposition by him subscribed was reduced to writing by me, and by said witness subscribed in my presence, and were taken at Delphos, Ohio, July 14th, 1876, notice of taking same being waived by attorneys present, as shown by agreement hereto attached, and all other formalities waived.

In testimony whereof I have hereunto set my hand and seal, this 14th day of July, A. D. 1876.

[SEAL.] BURRETT S. BROTHERTON,
Notary Public.

Agreement as to depositions.

Circuit court of the United States northern district of Ohio.

JOHN W. STOUT ET AL., PL'FFS,
v.
FRANCIS J. LYE ET AL., DEF'TS.

The foregoing depositions of F. J. Lye were taken by agreement of said pl'ffs and the First National Bank of Delphos, Ohio, one of the defendants. The notice for the taking of the same is hereby waived; also all formality of notice, certificate of officer before whom taken, the sealing up and mode of transmission of the same, and statute requirements are expressly waived, and the same shall be read upon the trial
34 of the issues between said parties, subject only to legal objections to the competency of any portion thereof.

Delphos, O., July, A. D. 1876.

HUTCHINS AND CAMPBELL,
Att'ys for Plaintiffs.
J. E. RICHIE,
Attorney for First National B'k of Delphos, O.

On behalf of defendant, the First National Bank of Delphos was offered the deposition of Joseph Boehmer, together with the exhibits thereto attached, which deposition is now on file in said cause, which was all the evidence introduced by said defendant, and which are in the words and figures following, to wit:

Testimony of Joseph Boehmer.

Deposition of witnesses taken in an action pending in the circuit court of the United States for the northern district of Ohio, wherein John W. Stout et al. are plaintiffs and F. J. Lye et al. are defendants, and for the First Nat. B'k, Delphos, Ohio, one of the defendants, at the time and place hereinafter certified, John Hutchins, esqr., appearing as att'y for plaintiff, and John E. Richey appearing as att'y for the First Nat. B'k of Delphos, Ohio, one of the defendants.

Ques. What is your occupation?

Ans. I am the cashier of the First Nat. Bank of Delphos, Ohio.

Ques. State what you know about the transactions of F. J. Lye, one of the def'ts herein, with your bank, concerning a note and mortgage of date about Nov., 1873.

Ans. There was an indebtednes of $10,000, represented by F. J. Lye's personal note, said indebtedness being to the First National Bank of Delphos, Ohio. This debt having matured, was in November, 1873, secured by a mortgage to the extent of six thousand dollars on dwell-
35 ing-house, two in-lots and one out-lot in Delphos, Allen County, Ohio, and to the extent of four thousand dollars by the stock of the Union Flouring Mills of Delphos, Ohio; at the time of giving the security two notes were executed for $6,000.00 and $4,000.00, each of

said notes being due six months after date, and dated on or about November 1st, A. D. 1873. I think the papers were prepared, and that Mr. Lye carried them in his pocket a few days before the mortgage was finally executed. There was no money paid to Mr. Lye at the time of the execution of the $6,000 note. It was to take up part of the old indebtedness. I don't know whether the $10,000 was an individual debt of Mr. Lye or a firm debt of Lye and Walsh. The indebtedness was there when I came into the bank; there was no security on the note. I think note of $10,000 was given up. The original indebtedness was for money loaned or cash advanced by the bank. The two new notes were taken for the old note.

Cross-examination by Mr. HUTCHINS:

Will you furnish a copy from bank books of the taking up the old notes and the giving of the new ones, including the $6,000 note due in six months and secured by mortgage, giving all the entries on ledger, day book, and discount book, and attach copy of entries to deposition.

Ans. I will do so, and the exhibits hereto attached, marked A, are true copies, and the only entries on the books relating to the transaction.

JOSEPH BOEHMER.

I, Burrett J. Brotherton, a notary public for the county of Allen, State of Ohio, do hereby certify that the above named Jos. Boehmer was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the foregoing deposition by him subscribed
35 was reduced to writing by me, and by said witness subscribed in my presence, and were taken at Delphos, Ohio, July 14th, 1876, notice of taking same being waved by attorneys present, as shown by agreement hereto attached, and all other formalities waved.

In testimony whereof I have hereunto set my hand and seal this 14th day of July, A. D. 1876.

[SEAL.] BURRETT J. BROTHERTON,
Notary Public.

EXHIBIT A.—*Copy of ledger.*

1873. Nov. 10th.	To Lye		6,000 00
" " "	"		4,000 00
"	By "		10,000 00

The above are the entries as they appear upon the ledger, as taken from the detail and credit journals, and are exact copies thereof, and show the renewal of an overdue claim of F. J. Lye of $10,000 by the substitution of a $6,000 obligation secured by mortgage, and another of $4,000 secured by certain stocks, being the same transactions referred to in my deposition, to which this is attached.

JOSEPH BOEHMER,
Cashier First Nat. Bk, Delphos, O.

Agreement as to depositions.

Circuit court of the United States, northern district of Ohio.

JOHN W. STOUT ET AL., PL'FFS,
vs.
FRANCIS J. LYE ET AL., DEF'TS.

The foregoing depositions of Joseph Boehmer, taken on the part of

the First Nat. Bank of Delphos, Ohio, were taken by agreement of said plaintiffs and said First Nat. B'k, notice of the time and place of taking the same, formality as to certificate, sealing up, and transmission, and all other matters required by statute are waived, and the same shall be read upon the trial of issues between said parties, subject only to legal objections as to the competency of any part thereof.

37

Delphos, O., July, 1876.

HUTCHINS AND CAMPBELL,
Att'y for Pl'ffs.

J. E. RICHIE,
Att'y for 1st National B'k of Delphos, O.

Agreed statement of facts.

In the circuit court of the United States for the northern district of Ohio.

JOHN W. STOUT ET AL.
v.
FRANCIS J. LYE ET AL. } Statement of facts.

On the 29th day of February, A. D. 1872, defendant Francis J. Lye executed and delivered to defendant First National Bank of Delphos his promissory note, for ($10,000) ten thousand dollars, for a loan of money to him by said bank, which transaction appears on the books of said bank as follows, to wit:

"Discounter, F. J. Lye; endorser, mortgage; payer, F. J. Lye. Date, February 29, 1872."

Afterwards, on the 23d day of October, A. D. 1872, said note was taken up by a new note for the same amount, which transaction appears on the books of said bank as follows, to wit:

"Discounter, F. J. Lye; payer, F. J. Lye; endorser, mortgage. Date, November 1, 1872, due December 1, 1872; amount, $10,000; exchange, $100, proceeds, $9,900."

Said amount marked "Exchange, $100" was the interest charged by said bank on said note up to the time it fell due, and was charged, October 23d, 1872, to Lye and Walsh, defendants herein, which firm of Lye and Walsh had an account with said bank; but said F. J. Lye had no separate account with said bank.

38

Afterwards, on the 2d day of December, A. D. 1872, said last-named note was taken up by a new note for the same amount, which transaction appears on the books of said bank as follows, to wit:

"Discounter, F. J. Lye; endorser, Nicholas notes collateral security; payer, F. J. Lye; payable here. Date, December 1, 1872; time to run, one month; when due, January 1, 1873; amount, $10,000; exchange, $100; proceeds, $9,900."

Said amount marked "Exchange, $100" was the interest charged by said bank on said note up to the *the* time it fell due, and was charged, December 2d, 1872, to Lye and Walsh, defendants herein.

Afterwards, on the 15th day of January, A. D. 1873, said last-named note was taken up by said Lye by a new note to said bank for the same amount, which transaction appears on the books of said bank as follows, to wit:

"Discounter, F. J. Lye; endorser, collaterals; payer, F. J. Lye; payable here. Date, January 1, 1873; when due, March 1, 1873; amount, $10,000; discount, $133; proceeds, $9,867.

The said amount marked "Discount, $133" was the interest charged by said bank on said note up to the time it fell due, and was charged, January 15, 1873, to said Lye and Walsh by said bank.

Afterwards, on the 28th day of February, A. D. 1873, said bank charged said Lye and Walsh in their account the sum of $200, interest on said last-named note from March 1, 1873, to May 1, 1873.

Afterwards, on the 29th day of April. A. D. 1873, said bank charged said Lye and Walsh the sum of $203.34, interest on said last-named note 61 days.

39 Afterwards, on the 9th day of July, A. D. 1873, said bank charged said Lye and Walsh in their account on the said books the sum of $206.67, interest on said last named note 62 days.

Afterwards, on the 9th day of July, A. D. 1873, said bank charged said Lye and Walsh in their account on the said books the sum of $206.67, interest on said last-named note 62 days.

Afterwards, on the 6th day of September, A. D. 1873, said bank charged said Lye and Walsh in their account on said books the sum of $203.50, interest on said note 61 days to November 1, 1873.

Afterwards, on the 10th day of November, A. D. 1873, said last-named note was taken up by said Lye by two new notes executed by said Lye to said bank, one for $6,000 and the other for $4,000, which transactions appear on the books of said bank as follows, to wit:

Discount register.

"November 10, 1873. Discounter, F. J. Lye; endorser, Philip Walsh; payer, F. J. Lye; payable at Delphos. Date, November 1, 1873; when due, January 1, 1874." Said entry of "Endorser Philip Walsh" must be an error on the books of said bank, as in fact said note had no endorser.

Said note was at the same time secured by a mortgage executed by said F. J. Lye and delivered to said bank, which mortgage on the 10th day of November, A. D. 1873, was duly filed in the recorder's office of Allen County, Ohio, at 11 a. m., by said bank, and recorded by the recorder of said county on the 11th day of November, A. D. 1873. Said premises described in said mortgage are situated in Allen County, Ohio, and are the same premises mentioned and described in the bill of complainants.

Said transaction as to said note for $4,000 appears in the discount register, a book kept by said bank, as follows, to wit: "November
40 10, 1873. Discounter, F. J. Lye; endorser, Philip Walsh; payer, F. J. Lye; payable at Delphos. Date, November 1, 1873; when due, February 1, 1874." Said note for $4,000 was secured by a pledge of $7,500 of mill stock as collateral.

November 10, 1873, said bank charged said Lye and Walsh in their account on said books the sum of $490, interest on said $10,000.

November 10, 1873, the discount and interest account of said bank was credited with said $490. Said F. J. Lye and Philip Walsh were partners in business, under the name and style of Lye and Walsh, from A. D. 1870 to A. D. 1875.

Afterwards, on the 29th day of December, A. D. 1875, said complainants commenced an action in the circuit court of the United States for the northern district of Ohio against defendants F. J. Lye and Philip Walsh, to recover a judgment against them in the sum of $5,106.36 and interest, in which proceeding said Lye and Walsh were duly served with process on the 3d day of January, A. D. 1876, of which proceeding said First National bank had no notice.

Afterwards, on the 15th day of December, A. D. 1876, said defendant First National Bank of Delphos commenced in the court of common pleas of Allen County, Ohio, an action against defendant F. J. Lye on a note of said Lye to said bank dated November 1, 1873, for $6,000, with interest from date at the rate of eight per cent. per annum, which is the same note hereinbefore described of that date and amount and secured by said mortgage, asking for judgment against said F. J. Lye for said $6,000 and interest, and that said premises may be sold and said mortgage foreclosed, and that said Lye was duly served with
41 process in said action last named by the sheriff of said county on the 20th day of January, A. D. 1876.

Afterwards, on the 31st day of January, A. D. 1876, being a day in the January term of the circuit court of the United States for the northern district of Ohio, said complainants recovered a judgment against said F. J. Lye and Phillip Walsh, for the sum of $5,130.20, their damages, and $37.06 costs. The first day of said January term of said court was January 4th, 1876. On the 31st day of January, A. D. 1876, an execution was duly issued on said judgment, which was duly levied on the premises described in complainant's bill, on the 1st day of February, A. D. 1876. Afterwards, on the 23d day of February, A. D. 1876, complainants commenced these proceedings, of which defendant, First National Bank of Delphos, had due notice on the 25th day of February, A. D. 1876.

Afterwards, on the 7th day of March, A. D. 1876, being a day in the February term, 1876, of said court of common pleas, Allen County, Ohio, said First National Bank of Delphos recovered a judgment against said F. J. Lye on said note and mortgage for $6,000, and interest in the sum of $71.28, with interest thereon at 8 per cent. per annum, until paid, for its costs, and a decree of foreclosure of said mortgage and a sale of said premises.

These complainants were not made parties to said proceedings by said First National Bank of Delphos against said defendant, F. J. Lye, in the court of common pleas, Allen County, Ohio, foreclosing said mortgage.

The first day of said February term, 1876, of the court of common pleas, Allen County, Ohio, was February 7, 1876.

It is hereby agreed that the foregoing is a statement of the facts in said cause, and that the same is to be used in the trial of said cause as the facts in said cause.

Nov. 20, 1876.

HUTCHINS AND CAMPBELL,
Solicitors for Complainants.
J. E. RICHIE,
Att'y and Solicitor for the First Nat. Bank of Delphos, O.

42 (Endorsed:)
Filed Nov. 28, '76.

CHAS. H. BILL,
Dep. Clerk.

And afterwards, to wit, on the 18th day of April, A. D. 1878, said plaintiffs filed their bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, John W. Stout and Jacob O. Stout, as principal and as sureties, are held and firmly bound unto Francis J. Lye, Philip Walsh, First National Bank of Delphos, Charles Emerson, and Peter Phelan, trustees, and the Savings Bank of Delphos, in the sum of five hundred dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 16th day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, the above bounden John W. Stout and Jacob O. Stout have appealed to the Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the 21st day of March, A. D. 1878, in a cause wherein the said John W. Stout and Jacob O. Stout were complainants, and the said Francis J. Lye and others were respondents. Now, therefore, the condition of this obligation is such that if the above-named appellants, John W. Stout and Jacob O. Stout, shall prosecute their appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against them as such appellants therein, then this obligation to be void, otherwise to remain in full force and effect.

JOHN W. STOUT. [SEAL.]
JACOB O. STOUT. [SEAL.]
AQUILA WILEY. [SEAL.]

Sealed and delivered in presence of—
H. C. BANKS,
EDWARD SCHWANGER.

43 STATE OF NEW YORK,
City and County of New York, ss:

On this 16th day of April, in the year one thousand eight hundred and seventy-eight, before me, Henry C. Banks, a notary public of the State of New York, resident in the city and county of New York, personally came John W. Stout and Jacob O. Stout, to me known to be the individuals described in and who executed the within bond, and severally acknowledged that they executed the same for the purposes therein mentioned.

In witness whereof, I have hereunto set my hand, and affixed my official seal, the day and year aforesaid.

[SEAL.] HENRY C. BANKS,
Notary Public, No. 3 John Street, New York City.

STATE OF OHIO,
Wayne County, ss:

Before the undersigned authority personally appeared, this 17th day of April, 1878, Aquila Wiley, who acknowledged the signing and sealing of the foregoing instrument for the purposes therein expressed.

In testimony whereof, I have hereto set my hand and the seal of the probate court of Wayne County, Ohio, this 17th day of April, A. D. 1878.

[SEAL] A. D. METZ,
Deputy Clerk.

An act to provide for the appointment of commissioners for taking affidavits, &c., for the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do.

Approved August 15, 1876.

44

DEPARTMENT OF STATE,
Washington, August 29, 1876.

A true copy.

CHAS. PAYSON,
Acting Chief Clerk.

(Endorsed:)
Approved and filed April 18, 1878.

E. W. PAGE,
Deputy Clerk.

THE UNITED STATES OF AMERICA,
Northern District of Ohio:

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein John W. Stout and Jacob O. Stout are the complainants, and Francis J. Lye, Phillip Walsh, The First National Bank of Delphos, Charles Emerson and Peter Phelan, trustees, and the Savings Bank of Delphos are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, this 14th day of September, A. D. 1878, and of our Independence the 102d year.

[SEAL.]

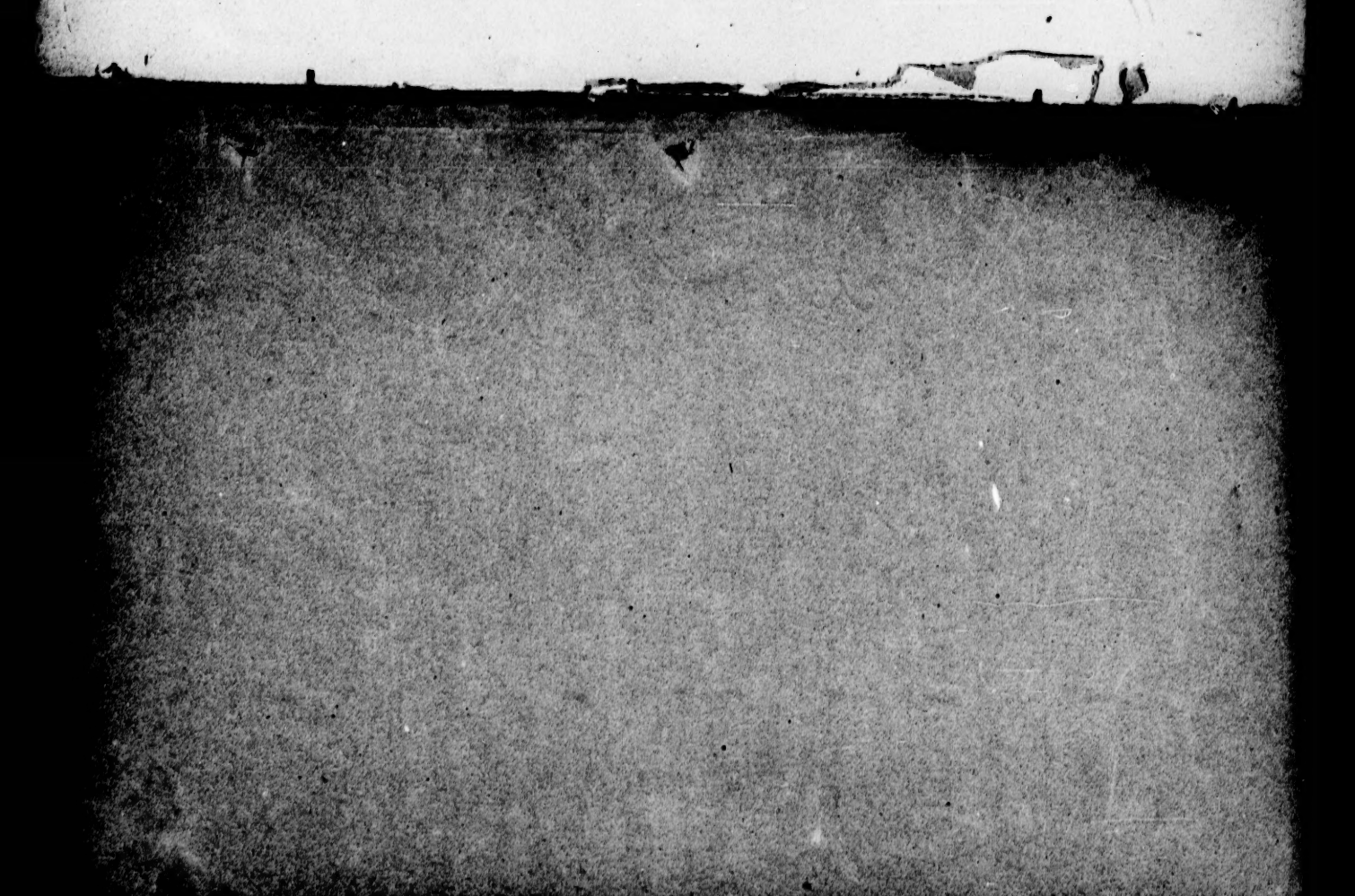
AUGUSTUS J. RICKS,
Clerk.

This transcript, $13,50, rec'd of Hutchins & Campbell.

A. J. RICKS,
Clerk.

(Indorsement on cover:) No. 491. John W. Stout and Jacob O. Stout, appellants, vs. Francis J. Lye, Phillip Walsh, The 1st National Bank of Delphos, et al. N. Ohio C. C. U. S. Filed 30th September, 1878.

REC. 491——3



OFFICE SUPREME COURT U. S.
FILED
JAN 4 1881
JAMES H. McKENNEY, CLERK.

SUPREME COURT OF THE UNITED S

JOHN W. STOUT, ET AL.,

vs.

FRANCIS J. LYE, ET AL.

S.

APPEAL FROM THE CIRCUIT COURT OF THE UNITE

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NORTHERN DISTRICT OF OHIO.

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BRIEF AND ARGUMENT FOR COMPLAI

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BY JOHN HUTCHINS.

In the Supreme Court of the United States.

JOHN W. STOUT, ET AL.,

vs.

FRANCIS J. LYE, ET AL.

BRIEF AND ARGUMENT FOR COMPLAINANTS.

The questions raised by the pleading and agreed statement of facts are:

1. Had the Circuit Court jurisdiction of the subject matter of the suit?

2. Was the mortgage of the First National Bank of Delphos void under the National Bank Law?

3. If the mortgage is not void within the meaning of said National Bank Law, we think the Court erred in not ordering a sale of the land, and protecting the mortgage, and applying balance on complainants' lien, according to the prayer of the bill.

4. If the Court had jurisdiction, and the bank mortgage is valid and a lien on the land, the right of the Court, and its duty also, was to grant the relief prayed for.

The prayer specifically asked for that relief.

ABSTRACT OF BILL OF COMPLAINT.

The introductory part of bill states names, residence, and citizenship of complainants and defendants.

The allegat ons are in substance as follows:

1. That at January term, 1876, complainants recovered judgment in the Circuit Court of U. S. for Northern District of Ohio for the sum of $5,130.20 and costs of suit, which is in full force.

2. That an execution was duly issued on said judgment, February 1, 1876, and levied on the land described in the petition, situate in Allen county, Ohio.

3. That Francis J. Lye, on the 6th day of November, 1873, executed a mortgage to the First National Bank of Delphos on the above described land.

Said mortgage was duly executed and recorded.

4. There are other mortgages set out in said bill, but they are withdrawn from controversy, and need not be here stated.

5. The matter in fifth paragraph of bill is also out of the case.

6. The allegation as to the mortgage executed by Lye on said land to said bank is, "That said mortgage was and is illegal, for the want of authority in said bank to take and receive it, and is therefore void as against the lien of your orators, by virtue of their judgment lien and levy above stated. That said mortgage was in fact given to secure a loan made at the date of the execution and delivery of said mortgage," and that the note was dated back to make it appear that it was for a pre-existing debt.

There is a question of usury made in the bill, but no evidence on that point.

PRAYER OF BILL.

So much of the prayer of the bill as it is necessary to consider by this Court on appeal is substantially as follows:

That if said mortgage is found by the Court to be illegal, that the Court will so declare and decree and remove the same from being a lien; and that the land be sold to pay complainants' judgment and costs; but if valid, that the land be sold,

and amount justly due on the mortgage be paid, and balance applied on complainants' judgment, and for general relief.

The only issue raised in the case was by the First National Bank of Delphos, whose amended answer is in substance as follows:

ABSTRACT OF AMENDED ANSWER OF FIRST NATIONAL BANK OF DELPHOS.

FIRST DEFENSE.

That the complainants ought not to maintain said action for the reason that this Court has no jurisdiction of the subject matter of this suit against this defendant; and he says in substance that on the 1st day of November, 1873, the said F. J. Lye executed and delivered to said bank a promissory note as a renewed evidence of debt he then, and for a long time prior thereto, owed said bank in the sum of $6,000, due in six months thereafter, with eight per cent. interest from date. That on the 8th day of November, 1873, said Lye executed and delivered to said bank, for the purpose of securing original debt so evidenced by said $6,000 note, his mortgage on the land described in bill. That the deed was duly executed and recorded November 10, 1873, in Allen County Records, where said land was situated, which became a lien from the filing thereof. That Lye has failed to pay the note. That on the 15th day of January, 1876, said bank commenced suit against said Lye to recover judgment against him on said note, and to foreclose said mortgage; that he was duly served with process in said suit, and that afterwards, on the 7th day of March, 1876, said bank recovered judgment in said suit against Lye for $7,128, with interest thereon at eight per cent. till paid, and a decree foreclosing said mortgage, and that said land should be sold and proceeds applied to pay said judgment, and costs, &c. That said judgment and decree are in full force.

SECOND DEFENSE.

That for a long time prior to November 1, 1873, the said Lye was indebted to said bank in the sum of $10,000, which was unsecured; the bank holding Lye's note for it. That on the 1st day of November, 1873, for the purpose of getting said sum secured to said bank, the bank divided the same into two parts,

one of $4,000, for which Lye then executed his note and secured the same with collaterals deposited with said bank, and for the residue of $6,000 the said Lye executed his note of renewal due in six months from date with eight per cent. interest. That the said Lye, for the purpose of securing the payment of said $6,000, duly executed and delivered on the 8th day of November, 1873, said mo tgage on said premises, which was duly recorded. That said mortgage was executed and received for the sole purpose and object of securing to said bank said $6,000 of said $10,000, which said Lye had been indebted to it long prior to said 1st day of November, 1873. That no loan of money or other value was given to said Lye by said bank at the time of executing said note or said mortgage, and the entire consideration of said note and mortgage was said debt existing prior to the execution of said note and mortgage.

A general denial of all facts in bill inconsistent with answer. Prayer for dismissal of bill.

A general replication filed.

AGREED STATEMENT OF FACTS.

On the 29th day of December, A. D. 1875, these complainants, being citizens and residents of the State of New York, commenced an action in the Circuit Court of the United States for the Northern District of Ohio, against said respondents, Francis J. Lye and Philip Walsh, who are citizens of the State of Ohio and reside in said Northern District, to recover a judgment against them in the sum of $5,106.36, in which proceeding the said Lye and Walsh were served with process on the 3d day of January, A. D. 1876.

On the 31st day of January, 1876, being a day of the January (1876) term of said Circuit Court, said complainants recovered a judgment against said Lye & Walsh, in their said action, in the sum of $5,130.20, their damages, and $37.06 costs.

The firs day of said January term of said Circuit Court was January 4th, 1876. On the 31st day of January, 1876, an execution was duly issued out of said Circuit Court on said judgment, which was duly levied on the said premises described in complainant's bill on the 1st day of February, 1876.

On the 23d day of February, 1876, the complainants commenced these proceedings of which the respondent, the said

First National Bank of Delphos, had due legal notice by the service of process on the 25th day of February, 1876.

On the 15th day of January, 1876, said respondent, the First National Bank of Delphos, commenced in the Court of Common Pleas of Allen County, Ohio, an action against said respondent, Francis J. Lye, on a note of said Lye to said bank, dated November 1st, 1873, for $6,000, with interest from date at the rate of 8 per centum per annum, which is the same note secured by the mortgage referred to in said complaint and answer, asking for a judgment against said Francis J. Lye for the said $6,000 and interest, and that said premises described in said mortgage may be sold and said mortgage foreclosed; in which said action said Lye was served with process by the sheriff of said Allen County, on the 20th day of January, 1876.

On the 7th day of March, 1876, being a day in the February (1876) term of said Court of Common Pleas, said First National Bank of Delphos recovered a judgment against said Francis J. Lye on said $6,000 note in the sum of $7,128, with interest thereon at 8 per cent. per annum, and a decree of foreclosure of said mortgage. In these said proceedings in said Court of Common Pleas these complainants were *not* made parties.

ARGUMENT.

The question of jurisdiction is an important one, and will be first considered.

It will not be claimed that the said Circuit Court of the United States of the Northern District of Ohio had no jurisdiction over the *parties* to this suit, as it is admitted that the complainants are citizens of the State of New York, and that these respondents are all citizens of the State of Ohio, and reside in said Northern District.

But the respondent, the First National Bank of Delphos, urges that said Circuit Court acquired no jurisdiction, on the theory that a court of competent jurisdiction which once *acquires* jurisdiction can maintain it to the exclusion of all other courts; claiming of course that the said Court of Common Pleas of Allen County *first* acquired jurisdiction by reason of the said suit brought in said Common Pleas Court of Allen County, on the 15th day of January, 1876.

Let us enquire into this.

When this suit was instituted in the said Circuit Court, February 23d, 1876, *all* the parties to the suit in said Court of Common Pleas were made parties defendants herein and duly served with process on the 25th day of February, 1876.

But *before* this date, viz: on the 31st day of January, 1876, an execution issued out of said Circuit Court on the judgment rendered against said Lye & Walsh, as aforesaid, which execution was duly levied upon the said premises described in said bill and mortgage on the first day of February, 1876. Thus said Circuit Court *first* acquired jurisdiction over the *subject matter* by the judgment rendered in the case of complainants against Lye & Walsh, January 31st, 1876, and by the levy of the execution on said judgment February 1st, 1876, on said premises.

We maintain as a legal proposition that "a court of competent jurisdiction over the *subject matter*, by judgment and levy, withdraws the property from the jurisdiction or the reach of the process of any other court."

In support of which proposition we cite the case of *Fox v. Hempfield R. R. Co.*, 2 Abbott U. S. Rep. 154.

Mr. Justice McLain, in the case reported in 10 Peters, 401, says: "The *first* levy, whether it was made under the Federal or State authority, withdraws the property from the reach of the process of the other."

The said Circuit Court acquired jurisdiction over the property in question (the subject matter) by levy, February 1, 1876. The said Court of Common Pleas of Allen County did not acquire jurisdiction over said property until March 7, 1876, by said judgment and decree of foreclosure, herein before referred to. It may be claimed by the First National Bank of Delphos that the said Court of Common Pleas of Allen County acquired jurisdiction first by reason of said proceedings commenced in said Court of Common Pleas on the 15th day of January, 1876, and that jurisdiction attached on said January 15th.

We maintain that the jurisdiction of said Court of Common Pleas did not attach until March 7th, 1876—the day said judgment and decree were had in said Common Pleas Court.

In the case of *Buck v. Coldbath*, 3 Wall. 335, the Court makes use of the following language:

"The rule that among courts of concurrent jurisdiction that "one which first obtains jurisdiction of a case has the exclusive "right to decide every question arising in the case, is subject to

"some limitations and is *confined* to suits between the *same* par-
"ties or privies seeking the *same* relief or remedies, and to such
"questions and propositions as arise ordinarily and properly to
"the progress of the suit first brought, and does *not* extend to
"all matters which by possibility become involved in it."

In the case of *Hatch v. Priston*, 1 Bissell 19, the Court says:

"The fact that a suit is connected with and grows out of
"matters litigated in a State Court *does not* prevent United
"States Courts from taking jurisdiction in the case if otherwise
"within the requirements."

In the case of *Putman v. New Albany*, 4 Bissell, 365, *McDonald J.* says:

"It is undoubtedly a general rule that when the Courts have
"concurrent jurisdiction *of the same subject matter*, the first
"that takes jurisdiction excludes the other. But this rule is
"subject to many exceptions. Indeed, it seems to apply *only* in
"cases where the *parties are the same*, or stand in privity to
"each other, and when the points in litigation and the redress
"sought in both Courts are identical."

In the case of *Watson* v. *Jones*, 13 Wall. 679, *Miller J.* says:

"When the pendency of a suit is set up to defeat the juris-
"diction of another, the case must be the *same;* there must be
"the *same* parties, or at least such as represent the same inter-
"est. There must be the same rights asserted and the *same*
"relief prayed for. This relief must be founded on the *same*
"facts, and the title or essential basis of the relief sought must
"be the same. The identity in *these* particulars should be
"such that if the pending case had already been disposed of,
"it could be pleaded in bar as a former adjudication of the
"*same* matter between the *same* parties."

Especial attention is directed to Mr. Justice Miller's opinion in the last above-cited case, as the same is able and exhaustive.

Applying the rule as explained and qualified by the authorities above referred to, how stands the issue between the parties to this controversy? Can it be said that the rule applies to and gives the *first* and *exclusive* jurisdiction to the said Court of Common Pleas of Allen County by reason of said suit commenced therein, January 15, 1876? We think not, for in that case the *parties* were not the same as in this, neither were

"the points in litigation, nor the redress sought in both courts identical."

The complainants, then, with all confidence claim that the said Circuit Court of the United States has full and undoubted jurisdiction over *all* the *parties* and the *subject matter* of this case, and is competent to try and determine all the issues raised therein.

First. Because it *first* acquired jurisdiction over the *property* in question by said judgment, which was a lien on said real estate from the 4th day of January, and by said levy, made February 1, 1876.

Second. Because they were not made parties to the said proceedings instituted in said Court of Common Pleas of Allen County.

It will be observed that the complainants, by these proceedings, do not propose to ask said Circuit Court to interfere with any *judgment*, *decree*, or *order*, had and made by the said Court of Common Pleas of Allen County, *before* said Circuit Court had acquired jurisdiction over both the *parties* and the *subject matter*.

The First National Bank of Delphos insists that the said Court of Common Pleas of Allen County first obtained jurisdiction of the person in this suit, and the subject matter of it, in such sort as to oust the jurisdiction of the said Circuit Court over the subject matter of and parties to this suit.

We believe the following proposition is sustained by all the authorities, viz: That property under judicial control of a court of competent jurisdiction by a lien, either by the process of a judgment, decree, or levy, is withdrawn from the control of any other court of concurrent jurisdiction. The authorities cited sustain this proposition. There is a distinction between a lien on property which a person may have by the acts of parties under operation of law, and a lien on property by the process of court under the operation of law. For instance, A has a valid mortgage from B on his real estate, which, when recorded, is a lien on B's land; but the property may never be brought under the judicial control of a court, so as to effect a question of jurisdiction. A brings a suit against B, obtains judgment against him, and it becomes a lien, if he has real estate, from the first day of the term at which the judgment is rendered; and if he has no real estate, and an execution is issued and

levied on his personal property, A has a lien on his personal property from the date of the levy. In the latter case the property is under the judicial control of the court,—the land, from the time the lien attaches, and the personal property from the date of the levy; both liens are acquired under the judicial process of the court by operation of law,—the one by the process of judgment, the other by the process of execution, and in both cases, from the date of the liens, the property is under the judicial control of the court in which the judgment is rendered. In the case of the mortgage lien, we insist that the court has no judicial control over the land embraced in the mortgage, till a judgment or decree is rendered.

The plaintiff may file his petition, get service, and dismiss his case before the court gets judicial control of the land. The court certainly has no control over the land on account of the execution and filing of the mortgage; if so, all land covered by mortgage in the jurisdiction of the court, is at all times under its control; and this theory would give, in a case where parties and subject matter give jurisdiction, both the United States Court and the Court of Common Pleas judicial control of the *same* property at the *same* time.

In all the cases cited, the court had jurisdiction over and judicial control of the property in dispute, and the one that first acquired jurisdiction of the *parties* and *subject matter*, or the judicial control thereof, maintained that jurisdiction and control to the exclusion of the *other* court, State or National, of concurrent jurisdiction. The only dispute here is the application of the facts in this case to the law as stated.

The suit at law in said United States Circuit Court, which resulted in a judgment against Lye & Walsh, was commenced December 29, 1875, before the commencement of the January term, 1876, of said Circuit Court. The said January term commenced January 4, 1876. Judgment was rendered January 31, 1876, (being in the said January term) and by the law became a lien on the land of Lye from the first day of the said January term. The lien on the land by the process of judgment was as complete on January 4th as it was on the 1st day of February. by virtue of a levy on the land of execution issued on the judgment, and it was constructive notice to all parties then claiming an interest in the land, or who should thereafter seek to acquire an interest in the said land. A judgment is not a lien on personal property till an execution is levied, and that

lien is created by virtue of the levy of the execution issued on the judgment; but the lien, thus made, does not more completely place the property under the judicial control of the court rendering the judgment, than the lien on the land created by the judgment without levy. When this judgment was rendered, January 31, 1876, the complainants could and would have immediately proceeded to issue execution, levy upon, and appraise the land and proceed to sell it, had there not been claims upon it that could not be adjusted by the legal process of the Court. As ancillary to the legal arm of said Circuit Court, it reached out its chancery arm, with its broader reach, to accomplish a result which could not be attained on the law side of the court. The foundation of the equitable relief is the judicial control which the said Circuit Court acquired over this land by virtue of said judgment and levy. The levy on the land was made February 1, 1876. On the 15th day of January, 1876, during the pendency in the said Circuit Court of the suit at law against said Lye & Walsh, which resulted in a judgment against them at the January term, 1876, the said bank commenced its suit in said Common Pleas Court of Allen County. The pending of the suit in the said Circuit Court was notice to the said bank that the judgment in said Circuit Court might become a lien on the land as of the first day of said term. The suit of the said bank was commenced *without* complainants being made parties, and on the 7th day of March, 1876, judgment was rendered against said Lye for the amount due on the note, and a decree of foreclosure. The date of this judgment and this decree is the time, and the first time, (except as the bank's judgment at law operated as a lien on the land from the first day of the term at which it was rendered, February 7, 1876,) that the said Court of Common Pleas of Allen County acquired any judicial control over the land described in the bank's mortgage. It had not before it the proper and necessary parties to enable it to determine the legality of the liens then on the land; and besides, at this time, March 7, 1876, the said Circuit Court had acquired judicial control over said land.

1st. By a judgment lien, January 4, 1876. 2d. By virtue of the levy of an execution on the land issued on said judgment, February 1, 1876; and 3d. On the 23d day of February, 1876, by the filing of the bill in this case making said bank a party, setting up the judgment and levy, and claiming that the bank's pretended lien, by virtue of its mortgage, was void. When the

bank obtained its judgment and decree in said Common Pleas Court of Allen County, March 7, 1876, the said Circuit Court had not only acquired judicial control and jurisdiction over the *land* but over the *person* of the bank, and over *all* parties necessary to adjust and settle conflicting liens on the land. The bank had notice of the judgment lien obtained by complainants in said Circuit Court when it commenced its suit, and had notice of the lien by the levy, and notice of the pendency of this bill in said Circuit Court to enforce said lien, when it took its judgment and decree in said Court of Common Pleas of Allen County.

If a person, during the pendency of a suit commenced before the term at which judgment is obtained against the owner of land, purchases land and receives a deed for it from the owner during the same term of the judgment, he takes it with *notice* of the lien of the judgment, which attaches from the first day of the term, although his deed may bear date *before* the day on which the judgment was rendered. Hence in making abstracts of title, to have them good for anything, there must be included suits pending against the owner of land, in which judgments may be obtained, as well as judgments rendered, which are already a lien on the land. We submit, then, that upon the theory of the respondent, the First National Bank of Delphos, the facts in agreed statement show that the said Circuit Court *first* obtained jurisdiction and control over the land in question and the parties to this suit, and to the suit in said Court of Common Pleas of Allen County.

The respondent, the First National Bank of Dephos, seeing the force of this, like a skillful parliamentarian who does not like all the propositions embraced in a motion, moves a division of the question, or rather in this case moves to divide the Circuit Court of the United States, and to make it two separate and independent courts, so that the right hand of the Court shall not know what the left hand doeth. This doctrine is certainly a new one to us, and can hardly, as we believe, be maintained. By the statutes of the United States, and of the State of Ohio, the same court is clothed with a dual nature, legal and equitable. It is one body, one entity, and has become such by the evolution of legislation. The modes of procedure are different, and that is about all. The origin of equity is said to be the correction of that wherein the law is deficient. The law

creating the court gives it a legal arm and an equitable arm, but they are shouldered in the same body. The equitable arm is generally ancillary to the legal arm, and is always to enforce a legal right, by modes and processes which a legal arm cannot use.

The case in the said Court of Common Pleas of Allen County is a good illustration of the dual nature of the Court: an action is commenced, judgment is rendered at law, and a decree in foreclosure, in the same entry and in the same Court, and it can hardly be said that *that* Court can be divided.

Take this case as an illustration. The complainants, by legal process, obtained a lien on the land in question, and brought it under the jurisdiction and control of the said Circuit Court as a court of law. At the time this jurisdiction and control were acquired, another person claimed that by operation of law he had a prior lien, by virtue of a mortgage. This person could not have been properly a party to the suit at law against Lye & Walsh. The land could not be sold on execution, so as to divest the lien of the respondent, the First National Bank of Delphos, if its mortgage had no validity, without making him a party. Even if its mortgage were void it would remain a cloud on the title of the purchaser, and no sale could have been made.

The *legal* process of the Court was not sufficient to bring said bank into court for the purpose of trying its title to the land. Hence an application is made to the same Circuit Court, to its *equitable* side, and to its *equitable* process, to bring the said bank into court and set up its title to property already under its *legal* control; and it is this *legal jurisdiction and control*, the residence of the parties, and the amount in controversy, which gave the said Circuit Court jurisdiction over the parties to this suit and the land in question.

The respondent, the First National Bank of Delphos, claims that the relief asked for by complainants in their said bill, will disturb and vacate the judgment of said Court of Common Pleas of Allen County, which the said Circuit Court has no power to do. This, of course, is predicated upon the assumption that the theory of respondent as to the jurisdiction being first acquired is correct. We do not admit it; but aside from this, the judgment of said Circuit Court will *not* disturb the judgment rendered in said Court of Common Pleas of Allen

County. The said respondent is entitled to that as against Lye. We only claim that said respondent's mortgage, being void, it cannot be enforced as against the lien of complainants, on the land acquired, as stated. If the Court should hold that said mortgage was legal and enforceable, we still insist that the said Circuit Court erred in refusing to grant the further relief prayed for in complainant's bill.

The validity of the mortgage to the bank we do not argue, as we are advised this court has already decided that question in another case adversely to the position assumed by complainants, but we do claim that the Court erred in refusing to decree the land in question to be sold, and to find that complainants had the second lien thereon next inferior to that of the bank.

JOHN HUTCHINS,

Solicitor for Complainants.

SUPREME COURT U.S.
FILED
JAN 21 1891

Supreme Court of the United

JOHN W. STOUT, Et Al.,

vs.

FRANCIS J. LYE, Et Al.

Appeal from the Circuit Court of the Unite

Northern District of Ohio.

Argument and Citation

By J. E. RICHIE.

Solicitor for the First National Bank of Delphos, Ohio, Respondent.

In the Supreme Court of the United States.

JOHN W. STOUT, Et Al.,

vs.

FRANCIS J. LYE, Et Al.

Argument and Citations

By J. E. RICHIE,

Solicitor for the First National Bank of Delphos, Ohio, Respondent.

The facts in this case being embraced in an "Agreed Statement of Facts," there remains no necessity for this Respondent to include any statement of facts in this brief.

Upon the facts in this case there arise two questions for the Court to declare the law upon.

First: Had the Circuit Court jurisdiction of this case?

If this question is answered in the negative, that disposes of the case.

We insist that the Circuit Court had no jurisdiction, for the reason that another Court of concurrent jurisdiction had first acquired jurisdiction over the subject matter of this suit.

The Complainants filed their bill in chancery, in the Circuit Court, to enforce a lien which they claim they acquired by reason

of a judgment recovered in the Circuit Court of the United States, for the Northern District of Ohio, in an *action at law* wherein Complainants were Plaintiffs, and Lye and Walsh were Defendants, and after execution on said judgment *at law* had been levied upon the real estate in Complainant's bill described.

Complainants having or claiming to have a lien *at law*, which they were unable to enforce successfully *at law*, resorted to a *Court of Chancery* to enforce that lien. That being the case, then the Circuit Court obtained jurisdiction of this cause upon the filing of Complainant's bill and the service thereunder, and *at no time prior thereto.*

It cannot be successfully claimed that a judgment *at law*, *obtained* in a *Court of law*, in a *suit at law*, even after execution had been issued and levy made upon real estate, would give a *Court of Chancery* jurisdiction over that property. The judgment and levy thereunder would create a lien in favor of the judgment creditor; but the power and jurisdiction of the *Court of law*, ceased and determined when the last step for which the action at law was brought, had been attained, to-wit: the *rendition of a judgment.* The court of law was effectual to create a lien under which a levy could be made.

But a Court of Chancery could in no wise aid the enforcement of that lien until its powers were invoked and the subject matter, the land upon which the lien was claimed, was brought within its jurisdiction, by bill filed, and the necessary parties brought before it by the process of the court. It is only by the filing of a bill and the service of process upon respondants, that a Court of Chancery acquires jurisdiction. (Bell *vs* Ohio Life and Trust Company, 1–Bissell, 260). By the bill the *subject matter* is brought before the court, and by the summons the respondants, the *parties*, are brought before the Court. Until this is done, a Court of Chancery powers *cannot* act, for there is neither subject matter to act upon, or parties to be affected by its decrees. It has jurisdiction neither of *parties* or *subject matter.*

By what process of logic can it be claimed that the Circuit Court had any jurisdiction over either the subject matter, or the parties, until Complainants filed their bill in this case on February 23, 1876, and summons served thereunder on February 25, 1876. The bill gave the Circuit Court the first notice of the claim made by Complainants, and first invoked the exercise of the Chancery powers of that Court. The Court in which the judg-

ment was obtained was a Court of *law jurisdiction*, while the Court from which this cause comes by appeal, is a Court of Chancerry jurisdiction—Courts as absolutely separate as if holden by different Judges and at different times and places. Courts which exercise absolutely distinct jurisdiction, and incapable of taking cognizance of the same subject matter; the judgment of the one gave the other the basis of an action, precisely as a mortgage lien upon the premi-es or levy under a judgment of a State Court would—nothing more.

The time when the Circuit Court obtained jurisdiction in this case being fixed on February 25, 1876, our next inquiry is: Had not the Court of Common Pleas of Allen county, obtained jurisdiction of the *subject matter* to enable it to determine all the issues, prior to February 25, 1876?

The "Statement of Facts," show that the First National Bank of Delphos, Ohio, this Respondent, held a lien upon the premises upon which Complainants claim their lien, by virtue of a mortgage executed by Francis J. Lye to said Bank to secure the payment of a certain $6000,00 note, given by him to the Bank, for money borrowed by him from the Bank prior to the date of the note and mortgage. This lien dated from date of mortgage and of record of same, to-wit: November 10, 1873—more than three years prior to the lien claimed by Complainants.

The note being overdue and condition of mortgage broken, this Respondent brought its action upon said note and mortgage, in the Court of Common Pleas of Allen county, Ohio, the land being situate in Allen county, Ohio, for a judgment against Lye, and for a foreclosure of said mortgage and order for the sale of mortgaged premises in default of the payment of such judgment.

That the Court of Common Pleas of Allen county, Ohio, is a Court of general jurisdiction is beyond cavil. Hence, Respondent, by filing its petition in the office of the Clerk of said Court, on January 15, 1876, (the Court will observe in the printed Record the word "January" is, by mistake, printed "December.") and the service of summons on Francis J. Lye, the only person necessary as a Defendant in that proceeding for judgment and foreclosure,—on January 20, 1876, gave that Court jurisdiction, of the person of Lye, by service of process, and of the subject matter of the action and of the land described in the Petition upon the mortgage. There was, then, nothing farther to be done to

authorize the Court of Common Pleas to enter a judgment and by decree, direct the sale of the land to pay that judgment.

The petition invoked the power of the Court over the land, and the summons gave Lye notice that the power of the Court was so invoked. Hence the judgment of the Court of Common Pleas, entered March 7, 1876, was but the exercise of a power over the person of Lye, and the property described in the mortgage and petition, by the filing of the petition January 15, and service of summons on Lye, January 20, 1876.

The claim that the jurisdiction over the land attached to the Court of Common Pleas, only upon the entry of the judgment and decree of foreclosure on March 7, 1876, is to confound the *exercise of jurisdiction, with that jurisdiction*—that the right to make an order did not exist until the order was actually made.

Can it be possible that jurisdiction—the right to hear and determine—did not exist, *until the matter was heard and determined?* That the Court of Common Pleas of Allen county, found an indebtedness, and a lien in favor of the Bank from November 10, 1873, and entered judgment and decreed a sale of the land to pay that judgment, and yet did not have jurisdiction of the subject matter? That the exercise of power gave that Court jurisdiction? That not until the thing *was done* had the Court the *power to do it?*

But to such extremes are Complainants' counsel driven by the facts in this case. That the Court of Common Pleas had jurisdiction at some time cannot be denied, and if it cannot be postponed to the date of judgment, it must have attached on January 20, 1876, upon filing of petition and service of summons on Lye—which was *eleven days* before Complainants had a judgment which could be a lien; *twelve* days before levy of execution, and *thirty-six days before this action was commenced.*

An action is commenced upon the filing of a bill or petition and the service of summons thereunder.

Bell *vs* Ohio Life and Trust Company. 1 Bissell 260.
State *vs* Bryce. 7 Ohio Pt. 2, p. 82.
Bell *vs* Phillips. 4 Conn., 149.
Davis *vs* Stevens. 19. Ohio, 222.
Rule 16, U. S. Supreme Court.

McLean, Judge, in deciding the case of Bell *vs* O. L. & T. Co., says:

"The power to hear and determine a case is jurisdiction, it "is *Corum Judice* when a case is pending which brings this

"power into action; if the petitioner presents such a case in his "petition, that on demurrer the Court would render a judgment "in his favor, it is a case of undoubted jurisdiction. * * * * "The established rule is, that a *lis pendens*, duly prosecuted and "not collusive, is notice to a purchaser, so as to affect and bind "his interest by the decree, and *lis pendens* begins from the ser- "vice of the subpoena after the bill is filed."

In Peck *vs* Jennis, 7 Howard, 624, Justice Grier says:

"It is a doctrine too long established to require citation of "authorities, that where a Court has jurisdiction, it has a right to "decide every question which occurs in the case. * * * * * "Where the jurisdiction of a Court, and the right of a plaintiff to "prosecute his suit have once attached, that right cannot be "arrested or taken away."

We cite Ruggles v. Simonton, 3 Bissell 325.

Freeman v. Howe, 24 Howard 450.

Wallace v. McConnell 13 Peters 136.

That the complainants were not made parties to the action in the Court of Common Pleas of Allen County would confer no right to prosecute their case in the Circuit Court, for two reasons:

1st. They could not have been made parties at the filing of Respondents petition in that Court, for they had no judgment or lien upon the mortgaged premises.

2d. That Court having jurisdiction of the only party necessary to a final disposition of the action of the plaintiff therein, the complainants must seek redress in that Court. Upon this proposition the case of Freeman v. Howe 24 Howard 450, is relied upon as conclusive authority, supported as it is by

Hogan v. Lucas 10 Peters 400.

Slocum v. Mayberry 2 Wheaton 2.

Fox v. Hempfield R. R. Co. 2 Abbott U. S. 251.

Buck v. Colbath 3 Wallace 341, which last case is particularly relied upon by respondent.

That complainants are so far privies to the respondent, Lye, as to make the judgment of the Court of Common Pleas of Allen County binding upon them, by the authority of Peck v. Jennis 7 Howard, 624, and other authorities cited, scarcely needs a passing notice.

At the time this respondent commenced its suit to foreclose its mortgage, Lye was the owner of the right of redemption, and to any surplus arising from a sale of the land upon foreclosure, af-

ter the payment of the mortgage lien. He so continued to be, until the complainants obtained their judgment lien on the land. Immediately upon the rendition of that judgment complainants succeeded to the rights of Lye in said lands, to the extent of their judgment lien, and might, at once, have gone into the Court of Common Pleas and asserted their lien, and asked for its enforcement. Aye, more; they might then have raised any and every question touching the validity of the mortgage, as well as the priority of liens which Lye could have raised, or which they sought to raise in the Circuit Court.

That this was their right, and only remedy is, we submit, fully settled by the authorities cited.

We scarce need to notice the authorities cited, quoted, and relied upon by complainants, as they will on examination, be found to support the position of this Respondent.

See Buck v. Colbath, 3 Wall. 338; Putnam v. New Albany, 4 Bissell, 265, in which complainants quote from the decision: "It is undoubtedly a general rule that when the Courts have "concurrent jurisdiction of the *same subject matter*, the first that "takes jurisdiction excludes the other. But this rule is subject to "many exceptions. Indeed, it seems to apply *only* in cases where "the parties are the same or stand in privity to each other, and "when the points in litigation and the redress sought in both Courts are identical." (The *italics* are the complainants.)

Was not the suit in the Court of Common Pleas and in the Circuit Court concerning the same *subject matter*—the lands mortgaged to this Respondent, and upon which complainants claim a lien—and was not the object of the suits—the redress sought—the sale of the land for the payment of the liens upon the same, the same in both cases; and do not the parties, if not the same stand in the relation of privies? Webster defines "Privy n. 1 (Law) "A partaker, a person having an interest in any action or thing; "one who has an interest in an estate created by another; a per-"son having an interest derived from a contract or conveyance to "which he is not himself a party."

That complainants by their judgment was subrogated to the rights of Lye in the real estate of Lye, and by operation of law became vested with all the rights Lye had in that land to the extent of their lien, and thus became privy to Lye in the action in the Court of Common Pleas, can scarcely be questioned.

Either Court had the power to determine all questions re-

lating to the land, including validity and priority of liens, if its power was properly called into operation.

Both Courts were appealed to by the filing of the proper complaints, the service upon the necessary parties.

Respondent filed its petition in the Court of Common Pleas of Allen county, Ohio, January 15th, 1876, against F. J. Lye, the only party holding or claiming title to the land sought to be affected by the power of the Court invoked in that petition, and caused him to be served with summons January 20, 1876.

After this date, to-wit, February 23d, 1876, complainants filed their complaint in the Circuit Court against all parties having or claiming liens upon said land, and caused summons to be served February 25th, 1876.

The time when jurisdiction attached to the Common Pleas Court is shown by the agreement of parties in this case.

The time when this action was commenced is shown by the date of the filing of complainants bill. This cause was not pending and could not be until the bill was filed and process served, under Rule 16, Supreme Court of the United States, and no jurisdiction could attach until suit was pending and the power of the Court was invoked as to some matter within its control.

What the exact claim of complainants upon this question of jurisdiction is, we cannot quite make out, from their printed brief.

While they stoutly *claim* jurisdiction first attached to the Circuit Court, they cite authorities which they *claim* decide that the questions submitted by complainants to the Circuit Court are not so far the same as those submitted to the Common Pleas Court, as to be affected by the prior jurisdiction of the Common Pleas Court. Yet the validity of the mortgage, the existence of the debt secured thereby, the amount thereof and its existence as a lien upon the lands of Lye, and the order of priority, were questions upon which both Courts were called to pass.

But in the last sentence, on page 12 of complainants brief, it is stated that the action of the "Circuit Court will *not* disturb the "judgment rendered in said Court of Common Pleas of Allen "County, Ohio. The said Respondent is entitled to that as against Lye."

We have, then, a judicial determination of the issues presented to the Circuit Court in this case, by a Court of competent jurisdiction, which complainants *concede* settled the controversy

between this Respondent and Lye, into whose shoes complainants stepped by their judgment and levy, and therefore bound by that which would bind Lye, in which the amount of the Respondents claim against Lye was determined, the validity of the mortgage and the lien created thereby on Lye's land and its priority were fully settled, and the land ordered to be sold to satisfy the same, which binds Lye and all who stand in relation to him as privies or have an interest in the suit.

Could the Circuit Court have re-adjudicated any of these questions?

The Court of Common Pleas having first obtained jurisdiction could have determined the priority of the complainants judgment, and ordered the payment of the same according to its priority, had anything been left after the payment of the mortgage lien. Why did not the complainants go into the Court of Common Pleas to seek the relief they so earnestly asked at the hands of the Circuit Court?

There can be but one answer, and that is: That the Supreme Court of Ohio in the case of Allen v. The First National Bank of Xenia, Ohio, 23 Ohio State Reports, page 97, had declared a mortgage taken by a National Bank under similar circumstances to be valid, and within the scope of the authority conferred by section 28, of the National Banking Act.

The second question which arises in this case is the validity of the mortgage taken by the Respondent. But as complainants in the last paragraph use this language, to-wit: "The validity of "the mortgage to the Bank we do not argue, as we are advised "this Court has already decided that question in another case "adversely to the position assumed by complainants, * * *" it may be taken as conceded by complainants, that the law is now fully settled upon that question, and that the taking of the mortgage to secure $6,000 of a $10,000 previously contracted indebtedness is within the authority conferred by Sec. 28, of the National Banking Act, and is within the holding, not only of Fowler v. Skulley, 72 Pa. Reports, 427; Woods v. Peoples' National Bank, same Court, Nov. 1876; Matthews v Skinner, 15 Am. Law Register 488, decided by the Supreme Court of Missouri, and Allen v. The First National Bank of Xenia, Ohio, 23 O. S. 97, but also of the Supreme Court of the United States. The right of the Bank to take the mortgage being settled, what relief can the complainants be entitled to? The last paragraph of complainants

brief closes with this singular statement: " * * But we do "claim that the Court erred in refusing to decree the land in ques- "tion to be sold, and to find that complainants had the second "lien thereon next inferior to that of the Bank."

This then appears to be all the complainants believe they are entitled to.

But the land had been ordered to be sold by the Court, which determined every question submitted to it, and which was open to complainants; in which if they did not avail themselves of their right to any surplus left after the payment of Respondents lien, and if they did not obtain that relief, their laches could not avail them in the Circuit Court.

The land having once been ordered sold, (and actually sold for far less than Respondent's lien) will not be by this Court ordered to be resold, and thus attempt to divest the purchaser of a title already acquired under a sale under the order of the Allen county Court.

If the Complainants have any remedy it is not in the Circuit Court, but in the Court of Common Pleas, of Allen County, Ohio; and therefore, the Circuit Court did not err, and its judgment of dismissal of complainants bill should be affirmed by this Court.

JOHN E. RICHIE,

Solicitor for Respondent, First National Bank of Delphos, O.